SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 473

GUY M. TURNER AND FRANK B. TURNER, DOING BUSINESS AS TURNER'S TRANSFER,

Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Appellees.

STATEMENT OF JURISDICTION

In this suit it was sought to set aside a final order of the Interstate Commerce Commission, and a statutory three-judge court heard the cause and entered a final decree sustaining the order of the Commission.

Jurisdiction in the trial court, and in this court on appeal is given by U. S. Code, Title 28, Sections 43, 45, 46, 47, 47a, 48, and 345.

The date of the decree sought to be reviewed is July 31, 1944. The date of filing this petition for appeal is August 10, 1944.

The proceedings before the Commission sought rights in appellants as a common carrier by motor vehicle over irregular routes under these statutes: *Section 203 (14)*

Interstate Commerce Act, Part 2; Title 49, U. S. Code, Section 303 (14), which defines applicant's business as follows:

> "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes * * *."

This language was inserted in 1940 to clarify the less clear language of the original Act. This paragraph originally read:

> "The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of Part I." (Paragraph (14) Sec. 223.)

The amendment of September, 1940, Chapter 722, 54 Stat. 923, added the "holding out" provision above. In the same section, paragraph 5 of the statute defines "certificate" as:

> "* * * a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle."

Section 206 of the Act (306 of the Code), paragraph a, prohibits operations of motor vehicles generally in interstate commerce,

> "* * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations; * * *."

However, in situations like that of appellants, it is, in the same section and paragraph, provided that:

> "* * * if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, * * * and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate."

The only place in the Act where "continuous" is used is in Section 203 of the Act, paragraph (b), sub-paragraph (7a), Section 303, Title 49 of the Code, where the word is used with its proper meaning of "uninterrupted." (See Lexicographers).

The Commission, sustained by the Court, throughout its opinion disregarded the words "within the territory," and construed the words "so operated" after June 1, 1935, to mean "continuity" of operations after that date.

The Commission found:

> "In view of applicants' holding out to serve a territory, services from and to these representative points will be considered as proof of bona fide operation from and to all points in these four counties." (Sheet II).

Immediately after the finding copied above, the Commission denied the right to operate in certain counties because

such counties "have not been served continuously." (Sheet II, last paragraph)

There were, as found by the Commission, interruptions varying in different states, but there is no evidence and no finding which remotely indicates that applicant failed at any time to serve any shipper who offered freight "within the territory for which application is made."

The Commission also found: 4,400 shipments after June 1, 1935, and 450 prior thereto, "within the territory." 4,850 shipments are "substantial." Considered in relation to size and in the light of growth since, the operation was substantial and was established in all the territories asked for. The evidence showed not only largely increased facilities at the time of the latest hearing, but an enlarged transportation service. (Note the list of movements and additional evidence in Exhibit "A" the Commission's Report, attached to appellant's petition, Sheets 3-6).

This construction of the law and this lack of findings present a substantial controversy not heretofore decided by the Supreme Court, and it is respectfully submitted that the principles of the decisions of the Supreme Court conflict with the opinion of the trial court in this case. *Howard Hall* v. *United States,* 315 U. S. 495; *Thomson* v. *United States,* 321 U. S. 19. The Commission itself has construed "continuity" differently in different cases.

Wherefore, it is respectfully submitted that the jurisdiction of this Court lies, and that this appeal is the appropriate way of invoking its jurisdiction.

This tenth day of August, 1944.

EDGAR WATKINS,
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APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, GREENSBORO DIVISION.

Civil No. 219 G.

Filed August 1, 1944.

GUY M. TURNER and FRANK B. TURNER, doing business as TURNER'S TRANSFER, Plaintiff,

Versus

UNITED STATES and INTERSTATE COMMERCE COMMISSION, Defendants.

On Application for Injunction

(Argued July 10, 1944. Decided)

Before Parker, Circuit Judge, and Webb and Hayes, District Judges.

William M. York, LaFayette C. Dotson, Edgar Watkins for Turner's Transfer; Edward Dumbauld, Special Assistant to the Attorney General, Wendell Berge, Assistant Attorney General, Carlisle W. Higgins, United States Attorney, Bryce R. Holt, Assistant United States Attorney, for United States; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, and Edward M. Reidy, Assistant Chief Counsel, Interstate Commerce Commission, for Interstate Commerce Commission.

HAYES, District Judge:

This is a suit under 28 U. S. C. A. 43-48 to set aside and enjoin an order of the Interstate Commerce Commission granting to the applicant a certificate of necessity for less territory and restrictions as to commodities less than that for which he applied. The findings in the report of the Commission were made by Division 5 of the Commission

on December 30, 1943, No. M. C. 66691. The Commission had made a prior report, 27 M. C. C. 131.

For convenience the territory applied for and refused and the commodities applied for and refused will be enclosed in parenthesis. The application under the 'grandfather clause' sought a certificate of public convenience as common carrier over irregular routes of, (1) general commodities (a) between points in North Carolina, South Carolina, and Virginia and (b) between points in those three states, on the one hand, and, on the other, points in Georgia, Alabama, Tennessee, West Virginia, Ohio, Indiana, Illinois, Michigan, Pennsylvania, Maryland, District of Columbia, Delaware, New York, New Jersey, Connecticut, Rhode Island, and Massachusetts; (The Commission granted the petition to the extent of territory of points in Guilford, Randolph, Chatham and Alamance Counties, North Carolina, on the one hand, and, on the other, Philadelphia, Pa., Baltimore, Md. and all points in Ohio traversing West Virginia and District of Columbia for operating convenience, and (5) empty containers, skids, and rejected or damaged shipments from and to the foregoing points in either direction.); (2) of household goods between points in North Carolina, on the one hand, and, on the other, points in Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Indiana, Illinois, Michigan, Pennsylvania, Maryland, District of Columbia, Delaware, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts, and (3) of machinery, construction materials and other heavy or bulky commodities requiring the use of special equipment between points in (Alabama), (Georgia), (South Carolina), North Carolina, (Tennessee), (Virginia), (West Virginia), (Ohio), (Indiana), (Michigan), (Illinois), (District of Columbia), (Maryland), (Delaware), (Pennsylvania), (New Jersey), (New York), (Connecticut), (Rhode Island), and (Massachusetts).

The Commission allowed the application between points in North Carolina, on the one hand, and, on the other, points in Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Michigan, Indiana, Illinois, Pennsylvania, Delaware, Maryland, New Jersey, New York,

Connecticut, Massachusetts, Rhode Island, and District of Columbia, and empty machinery cases (wooden boxes) from all points in North Carolina to Reading, Pa.

With respect to general commodities the Commission analyzed the evidence thoroughly and said,

> "In our opinion the Greensboro area is the only area which was served substantially prior to the statutory date with a sufficient variety of commodities to establish a general commodity service * * * we conclude that applicants have been in bona fide operation prior to June 1, 1935 and continuously since, from and to points in Guilford, Randolph, Chatham and Alamance Counties, in North Carolina and that these four counties constitute the base area served by applicants in the transportation of general commodities."

The Commission further stated,

> "Although the operations conducted prior to June 1, 1935 may have been more extensive than those authorized herein, applicant can not be granted 'grandfather rights' to serve points and areas which, according to the complete evidence of operations since the statutory date, have not been served substantially and continuously since that time. In reaching this conclusion we have been guided by the principles announced by the Supreme Court in U. S. v. Carolina Freight Carriers Corporation, 315 U. S. 475."

At the second hearing the Commission considered all of the evidence that had been produced including the evidence that was produced at the first hearing. Its findings of fact are in line with what has been stated above and to avoid undue length they will not be restated here.

The complainant contends that the findings of the Commission necessitate a reversal because of an erroneous application of the law to the facts found; that irregular routes necessarily negative continuity; that substantial and continuous service from June 1, 1935 to the filing of the petition do not apply to carriers over irregular routes; that the Commission's ruling would require a carrier to go re-

gardless of whether he had freight to haul and relies on *Thomson* v. *United States*, 321 U. S. 19, to sustain his contention. The facts in that case were not disputed. The Supreme Court said:

> "The railroad alone is entitled to common carrier 'grandfather's rights as to the motor vehicle service forming an integral part of its unified freight service. Any other conclusion would authorize the wholesale granting of twenty-three 'grandfather' permits to the various motor vehicle operators on the basis of this single transportation service offered by the railroad—a result which ascribes to Congress an intent incompatible with its purpose of regulation."

The Substantiality and continuity of service was not in dispute. The Commission had held that the railroad was not entitled to the certificate because it had procured the service to be rendered by twenty-three independent truck contractors. We are unable to find anything in that case which sustains the complainant here. Nor does U. S. v. Carolina Carriers Corporation, 315 U. S. 475, (38 Fed. Supplement, 549) help complainant. The Commission applied the law of that case in its disposition of the application here. That case involved a carrier over irregular routes. As to the power of the Commission to limit the territorial scope of operations, the Court there said:

> "While service to and from all points in the states included in the application was not allowed, the reduction was determined by the standard of substantiality of service, and consideration was given to the characteristics of irregular route carriers and their role in the national transportation system. That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only where the error is patent may we say that the Commission transgressed."

Measured by this standard, the instant case as to the scope of territory is peculiarly one for the Commission. We find no error in this regard.

In *Bush Transfer, Inc.* v. *United States,* 53 Fed. Supp. 640, this court had occasion to consider the construction of the statute with respect to carriers over irregular routes as to territorial scope and restrictions on commodities and Senior Circuit Judge Parker said:

> "With respect to the limitation of commodities authorized to be carried in north-bound transportation, we think that this, as well as points to be served, was a matter to be determined by the Commission in application of the standard of substantiality of service within the critical period. The record discloses that, notwithstanding a somewhat broader holding out, the north-bound service of plaintiff during the critical period had been confined to the transportation of new furniture, and we think that the Commission was acting in the proper exercise of its power in limiting authority under the certificate accordingly. As said by the Supreme Court in United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 483, 62 S. Ct. 722, 727, 86 L. Ed. 971: "It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say he may be a common carrier only of a restricted number of commodities."

The evidence in the record affords a reasonable basis to sustain the findings of the Commission both as to territorial scope and commodities to be carried. Congress conferred upon the Commission the power to form its judgment and to enter appropriate orders. There is no error justifying this court to set the order aside.

From what has been said it is not necessary to devote more comment to the contention that the Commission erred by requiring continuity of service after June 1, 1935. It is urged here that the statute does not require continuity subsequent to June 1. The Act (49 U. S. C. 306) directs the Commission to issue a certificate of necessity to a carrier who "was a bona fide operation as a common carrier by motor vehicle on June 1, 1935 and has so operated since that time * * * except * * * interruption of service over which applicant * * * had no control." Bona fide operation as a com-

mon carrier means substantial as distinguished from occasional or sporadic service. *U. S.* v. *Carolina Freight Carrier Corp., supra.* The phrase "and has so operated since that time" means continued bona fide operation as a common carrier. If substantial service prior to June 1, is essential to the granting of the certificate, it follows that the carrier must continue in that bona fide operation if he secures a certificate. To hold otherwise would delete from the Act the words "and has so operated since that time". This the court will not do. It is therefore the duty of the commission to consider the evidence and to determine from it whether there was bona fide operation as a common carrier before June 1, 1935; if so, whether that bona fide operation continued since that time. These are questions of fact for the determination of the Commission from the evidence produced. The weight of that evidence is for the Commission not the courts. The evidence here is substantial, supports the findings and no error of law is discovered to vitiate the findings.

For the reasons stated the injunction will be denied and the suit dismissed.

Injunction denied and suit dismissed.

JOHN J. PARKER,
United States Circuit Judge, Fourth Circuit.
E. Y. WEBB,
United States District Judge, Western District of North Carolina.
JOHNSON J. HAYES,
United States District Judge, Middle District of North Carolina.